nature that can readily merge its identity into that of the instrument to which it is attached. It must not be in itself a separate legal instrument. The reasoning in support of the doctrine of necessity would seem to proceed somewhat as follows: An indorsement is an institution of the law merchant, and carries with it consequences that are peculiar to itself; a writing to be subjected to those consequences must be made in the manner prescribed by the custom of the merchants; such custom has required the indorsement to be made either on the instrument, or, when the back of the latter is already filled then on a paper attached for the purpose; that if the writing appears on an attached paper in the absence of the element of necessity, it must be presumed that the intention was to avoid the consequences of the technical indorsement and make the writing a mere assignment.

The cases, then, on the matter of an allonge would seem to show three lines of decision: first, one which requires necessity to be present before allowing the allonge and indorsement thereon, and which places no stress on the nature of the paper used; second, one which permits mere convenience to warrant the allonge, and which likewise places no stress upon the nature of the paper; third, one which places all stress upon the nature of the paper attached and requires it to be of a character other than that of a separate instrument made for an independent purpose. The instant case is of the first class; and it places Alabama among those jurisdictions that have expressly repudiated the doctrine initiated by *Crosby* v. *Roub.* T. H. W.

RIGHTS OF THE PARTIES TO A CONTRACT DISCHARGED BY IMPOSSIBILITY OF PERFORMANCE.—In consideration of the defendant moving plaintiff's barn and paying plaintiff $100 the plaintiff agreed to allow the defendant to use his land. Before defendant moved the plaintiff's barn it was burned through no fault of either party. Plaintiff now sues to recover the loss which he has suffered by reason of the failure of defendant to move the barn. *Held*: Plaintiff can recover, and the measure of damages is what it would have cost defendant to move the barn. *Jones-Gray Construction Co.* v. *Stevens,* (Ky. 1916), 181 S. W. 659.

Where contracts, after being partly performed, are discharged because of impossibility of performance, difficult questions arise as to the rights of the parties. If the contract is divisible and severable, e. g., if the price paid for the performance is payable in installments as a certain portion of the work is completed, and these installments are proportioned to the value of the work done, the plaintiff can recover for the installments fully earned. *Richardson* v. *Shaw,* 1 Mo. App. 234; *Siegel-Cooper Co.* v. *Eaton Co.,* 165 Ill. 550, 46 N. E. 449. If the contract is not severable and the consideration is entire for the complete performance of the contract, the court cannot make over the contract by apportioning the consideration, and the recovery, if any, must be quasi-contractual. The question has frequently arisen where plaintiff agreed to furnish labor and materials in the improvement of an existing building and the building is accidentally destroyed after part of the work is done. The weight of American authority in such cases is to the effect

that the plaintiff may recover for the fair value of his labor and materials. *Butterfield* v. *Byron,* 153 Mass. 517, 27 N. E. 667; *Dame* v. *Woods,* 75 N. H. 38, 70 Atl. 1081; *Hayes* v. *Gross,* 40 N. Y. Supp. 1098, affirmed without opinion in 162 N. Y. 610, 57 N. E. 1112; *Cook* v. *McCabe,* 53 Wis. 250, 10 N. W. 507. See WOODWARD, LAW OF QUASI CONTRACTS, § 116. Such holding is usually based on the theory that, when a contract is discharged by impossibility of performance, benefits conferred by either party upon the other in reliance upon the contract (the consideration for which cannot now be obtained under the contract) constitute an unjust enrichment of the other party. By plaintiff's performance his labor and materials have become incorporated into the property of the defendant and thus inured to his benefit. The subsequent loss of the property should be borne by the defendant under the principle *res perit domino.* The English and a few American authorities take the opposite view to the above cases and hold that no recovery can be had,—upon the short ground that "it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither." *Appleby* v. *Myers,* L. R. 2 C. P. 651, 16 L. T. N. S. 669; *Siegel-Cooper Co.* v. *Eaton Co.,* 165 Ill. 550, 46 N. E. 449. Other cases have denied recovery on the more plausible theory that the defendant has not benefitted by plaintiff's performance, the improved property having been destroyed. *Krause* v. *Trustees,* 162 Ind. 278, 70 N. E. 264; *Taulbee* v. *McCarty,* 144 Ky. 199, 137 S. W. 1045. In the principal case the parties are reversed, the defendant having contracted to work upon plaintiff's property, the destruction of which prevents his performance, and the plaintiff suing to recover the consideration paid. In such a case the principle of *Butterfield* v. *Byron, supra,* permits recovery. That rule works both ways. On the other hand, the rule of *Siegel-Cooper Co.* v. *Eaton Co.,* supra, denies recovery in the one case as well as the other. The principle of the last group of cases which denies relief to the party who furnishes labor and material because the defendant is not benefitted, is inapplicable to the instant case, for the benefit received by defendant has not been lost to him. This case is therefore entirely consistent with the earlier Kentucky case of *Taulbee* v. *McCarty, supra.*

It is submitted, however, that the measure of recovery laid down in the case, viz., the amount it would have cost defendant to move plaintiff's barn, is erroneous. Evidently the court had in mind as the proper measure of damages the amount which the defendant was actually benefitted by his failure to perform. This means that if the defendant has made a good bargain under the contract, and it would have cost him less to move the barn than the value of plaintiff's land minus the $100 paid, the defendant will be given the advantage of his contract to that extent and is bound to pay plaintiff only the actual cost to himself of the performance. The facts show that the cost would have been appreciably less to the defendant than to anyone else for the same performance because he was so situated that he could have done the work at a comparatively low figure. But the contract has been discharged by impossibility of performance, and since the defendant cannot perform the duties imposed upon him by it, neither should he be

allowed to retain benefits which can be claimed only under it. Recovery being quasi-contractual, the plaintiff is entitled to have restored to him the value he has parted with and for which he has received no return. That is, the plaintiff is entitled to restitution. WOODWARD, LAW OF QUASI CONTRACTS, 199. The value which the plaintiff has lost and the defendant acquired in this case, and the consideration for which has failed, is the use of the plaintiff's land which the defendant has enjoyed. It therefore follows that the measure of recovery should be the rental value of the use of the land, less the $100 paid plaintiff by defendant. In the cases above cited of partial performance of improvements on a building, the measure of recovery allowed in each case was the value of the labor and materials of the plaintiff. In the absence of a contract the measure of recovery for the benefit conferred on defendant at plaintiff's expense is the fair market value of that benefit, without reference to whether defendant was actually enriched by its receipt, or how much he was enriched. *Vickery* v. *Ritchie,* 202 Mass. 810, 88 N. E. 835; *Rogers* v. *Becker-Brainard Milling Machine Co.,* 211 Mass. 559, 98 N. E. 592; *Fabian* v. *Wasatch Orchard Co.,* 41 Utah 404, 125 Pac. 860. If defendant had acquired money from the plaintiff instead of the use of the land the court would not have hesitated to make this sum of money (less any value received by plaintiff) the measure of recovery (*Bibb* v. *Hunter,* 63 Ky., 494); and the fact that the benefit takes another economic form should not affect the question. W. C. M.

SETTING ASIDE A DEFAULT JUDGMENT BECAUSE OF EXCUSABLE NEGLECT BY ATTORNEY.—In the recent case of *Krause* v. *Hobart,* 155 N. W. 279, X had employed an attorney to make defense and the attorney was present when the defaults were called but, being busy at the time, did not hear the case in question called and judgment went by default. On X's motion to vacate the default, the Supreme Court of Iowa held that such facts were a sufficient showing of unavoidable casualty and misfortune under § 4091 of the Code, providing for the vacation of judgments in case of "unavoidable casualty and misfortune."

Notwithstanding the general rule that relief from a final judgment after the end of the term in which it was rendered can be had—in the absence of motion for relief carried over the term as unfinished business,—only by bill for review or other appropriate new action, the authority of the courts over regular judgments has, in several of the states, been extended beyond the term in certain cases specified by statutes or court rules differing too much in their terms to admit of statement of any general rule. It was under such a statute that relief was granted in the principal case.

In the majority of states, notwithstanding these statutes, the courts have steadily refused to set aside or vacate judgments because of the neglect, misconduct, or inadvertence of counsel employed in the case. The general rule is that the neglect of the attorney is the neglect of the client, and that no mistake, inadvertence, or neglect attributable to any attorney can be successfully used as a ground for relief, unless it would have been excusable if